

# EXECUTIVE SECRETARIAT

## ROUTING SLIP

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SUSPENSE

Date

Remarks

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Executive Secretary

4 Apr 85

Date

3637 (10-81)

WASHINGTON

906/1

CABINET AFFAIRS STAFFING MEMORANDUM

Date: 4/2/85 Number: ----- Due By: -----

Subject: Cabinet Council on Economic Affairs Minutes  
March 1, 1985 Meeting

	Action	FYI
<b>ALL CABINET MEMBERS</b>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Vice President	<input type="checkbox"/>	<input type="checkbox"/>
State	<input type="checkbox"/>	<input type="checkbox"/>
Treasury	<input type="checkbox"/>	<input type="checkbox"/>
Defense	<input type="checkbox"/>	<input type="checkbox"/>
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REMARKS:

Attached for your information are the minutes of the March 1 meeting of the Cabinet Council on Economic Affairs.

RETURN TO:

☐ Alfred H. Kingon  
Cabinet Secretary  
456-2823  
(Ground Floor, West Wing)

☐ Don Clarey  
☒ Tom Gibson  
☐ Larry Herbolzheimer

Associate Director  
Office of Cabinet Affairs

DCI  
EXEC  
REF

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MINUTES  
CABINET COUNCIL ON ECONOMIC AFFAIRS

March 1, 1985  
8:45 a.m.  
Roosevelt Room

Attendees: Messrs. Baker, Baldrige, Pierce, Darman, Ford, Burnley, Boggs, Niskanen, Porter, Wright, Breedon, Gibson, Ginsburg, Healey, and Li, and Ms. Risque.

1. Report of the Working Group on Corporate Takeovers

Doug Ginsburg presented a report of the Working Group on Corporate Takeovers, which proposed an Administration position on possible Federal legislation restricting corporate takeover activity. The proposed position includes the following elements.

First, corporate takeovers perform several beneficial functions and are generally good for the economy. The same reasons justifying mergers also apply to hostile takeovers, which include gaining operating efficiencies and shifting corporate assets to higher valued uses. Moreover, takeovers pressure target managements to maximize shareholder wealth. The empirical evidence indicates that shareholders in both the target and bidding companies benefit from successful takeovers.

Second, the Working Group analyzed the extent of the problem of abuses in tender offers. Although various limitations on bidder activities have been proposed, the need for additional restrictions on such activities has not been demonstrated. These proposed limitations include prohibiting two-tier tender offers and extending the 20-day tender offer period.

Target company shareholders need and have protection from abuses by target managements in conjunction with contests for corporate control. They need protection because of the agency problem. Managers may not act in the best interests of shareholders because of divergent interests. In particular, the target management may oppose a tender offer in order to protect its employment even if the tender offer is in the best interests of the shareholders.

Minutes  
Cabinet Council on Economic Affairs  
March 1, 1985  
Page two

Third, several means exist for checking management abuses and providing shareholder protection:

- o Shareholders can oppose management through the proxy process. Although management controls the proxy process, the influence of institutional shareholders maybe making this approach more effective.
- o Contracts between shareholders and managers can align their interests more closely, for example, through stock options.
- o State courts can protect the interests of target shareholders. There are many pending decisions involving target management abuses, which will reveal the value of this safeguard.
- o States can amend their corporation laws to deal with abusive defensive tactics.

Fourth, only if there is a serious market failure of national dimensions should the Federal Government then consider taking appropriate steps to curb the potential for abuse.

The Council discussed the ability of the States to check certain abuses, such as greenmail. The Council also reviewed the likelihood of corporate takeover legislation passing this year. The Chairman of the Securities and Exchange Commission recently indicated privately that he will not support legislation restricting takeover activity. Finally, Council members noted the potential for such legislation opening the way for Federal corporation law.

The Chairman Pro Tempore requested the Executive Secretary to prepare a memorandum from the Cabinet Council to the President, recommending the proposed Administration position on corporate takeovers.

EXECUTIVE SECRETARIAT  
ROUTING SLIP

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SUSPENSE

Date

Remarks

per Kathy - no one attending  
the meeting

STAT

Executive Secretary

1 March 1985

Date

WASHINGTON

## CABINET AFFAIRS STAFFING MEMORANDUM

Date: 2/28/85 Number: 169144CA Due By:

Executive Registry

85- 906

Subject: Cabinet Council on Economic Affairs Planning Meeting

Corporate Takeovers

March 1, 1985 - 8:45 A.M. - Roosevelt Room - TOPICS: Pension Policy

ALL CABINET MEMBERS	Action	FYI		Action	FYI
Vice President	<input type="checkbox"/>	<input type="checkbox"/>	CEA	<input type="checkbox"/>	<input type="checkbox"/>
State	<input checked="" type="checkbox"/>	<input type="checkbox"/>	CEQ	<input type="checkbox"/>	<input type="checkbox"/>
Treasury	<input checked="" type="checkbox"/>	<input type="checkbox"/>	OSTP	<input type="checkbox"/>	<input type="checkbox"/>
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HHS	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Chew (For WH Staffing)	<input checked="" type="checkbox"/>	<input type="checkbox"/>
HUD	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Chapman	<input type="checkbox"/>	<input type="checkbox"/>
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Counsellor	<input checked="" type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
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Chief of Staff	<input checked="" type="checkbox"/>	<input type="checkbox"/>	Executive Secretary for:		
GSA	<input type="checkbox"/>	<input type="checkbox"/>	CCCT	<input type="checkbox"/>	<input type="checkbox"/>
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## REMARKS:

There will be a meeting of the Cabinet Council on Economic Affairs on Friday, March 1, at 8:45 A.M. in the Roosevelt Room.

The agenda and background paper for the second agenda item are attached.

## RETURN TO:

☐ Alfred H. Kingon  
Cabinet Secretary  
456-2823  
(Ground Floor, West Wing)

☐ Don Clarey  
☐ Tom Gibson  
☐ Larry Herbolsheimer

Associate Director  
Office of Cabinet Affairs

456-2800 (Room 129, OEGB)

DCI  
EXEC  
REG

L300B

THE WHITE HOUSE

WASHINGTON

February 27, 1985

MEMORANDUM FOR THE CABINET COUNCIL ON ECONOMIC AFFAIRS

FROM: ROGER B. PORTER *RBP*

SUBJECT: Agenda and Paper for the March 1 Meeting

The agenda and paper for the March 1 meeting of the Cabinet Council on Economic Affairs are attached. The meeting is scheduled for 8:45 a.m. in the Roosevelt Room.

The Council is scheduled to consider two agenda items: corporate takeovers and pension policy. The Council last considered corporate takeovers at its meeting on July 24, 1984, when it established an interagency working group to determine the extent of the problem of abuses in tender offers and what approach would best address potential abuses. The Working Group has held a number of meetings examining the data and developing an Administration position on possible corporate takeover legislation. A package of materials from Doug Ginsburg, chairman of the Working Group on Corporate Takeovers, was distributed to Council members on January 22. A "Proposed Administration Position on Corporate Takeovers" incorporating the latest revisions was distributed to Council members on February 15.

The second agenda item is the report of the Working Group on Pension Policy chaired by William Niskanen. A memorandum from the Working Group reviewing the status of several current pension policy issues and requesting the Council's guidance is attached.

Attachments

THE WHITE HOUSE  
WASHINGTON

CABINET COUNCIL ON ECONOMIC AFFAIRS

March 1, 1985

8:45 a.m.

Roosevelt Room

AGENDA

1. Report of the Working Group on Corporate Takeovers (CM#481)
2. Report of the Working Group on Pension Policy (CM#112)



**EXECUTIVE OFFICE OF THE PRESIDENT**  
**COUNCIL OF ECONOMIC ADVISERS**  
WASHINGTON, D.C. 20500

February 27, 1985

**MEMORANDUM FOR THE CABINET COUNCIL ON ECONOMIC AFFAIRS**

**FROM: PENSION POLICY WORKING GROUP**

**SUBJECT: Pension Policy Issues**

The purpose of this memorandum is to bring the CCEA up to date on the current status of recent pension policy developments and to seek the guidance of the Council on several issues.

**1. Minimum Funding Waivers**

The Internal Revenue Service has the authority to grant waivers of normal pension plan funding requirements in cases of "substantial business hardship." A plan sponsor can receive minimum funding waivers for up to five years out of any consecutive 15 year period. Minimum funding waivers are, in essence, loans from pension plans to plan sponsors. If these loans are not repaid, the resulting loss falls primarily on the PBGC insurance system and secondarily on plan participants. The PBGC estimates that 20 percent of the deficit in the single employer fund can be attributed to waivers of minimum funding standards.

Minimum funding waivers raise important and complex issues. In some cases, the long term viability of a firm may depend on a minimum funding waiver. Chrysler, for instance, was granted minimum funding waivers as part of a rescue package that included a federal loan guarantee.

The appropriateness and effectiveness of federal actions in the Chrysler case is still a matter of debate. The role played by funding waivers in the rescue package is also unclear. The waivers may have played an important role by providing credit and by increasing the Federal stake in the ultimate survival of Chrysler. It is also possible that the funds would have been supplied by other sources if a minimum fund waiver had been denied.

The PBGC estimate of the losses to the single employer fund that have been caused by minimum funding waivers is based on the assumption that funding waivers have not affected the survival rates of firms. To the extent that funding waivers do increase survival probabilities, some funding waivers may have

- 2 -

reduced the drain on the PBGC. The PBGC estimate includes only the losses due to the termination of plans that have received waivers, it does not include any estimate of plan terminations that may have been avoided because of funding waivers. To date there has been no analysis of the effect of funding waivers on the long term viability of firms.

The PBGC has recommended several changes in the procedures for granting minimum funding waivers to provide greater security to plan participants and the PBGC:

1. Reexamine (tighten) policies for granting waivers.
2. Make waiver request subject to public comment to give plan participants a better opportunity to participate in the decision to grant waivers.
3. Replace actuaries with financial analysts in funding waiver process so that viability of a firm can be assessed.
4. Require plan sponsor receiving a funding waiver to post a bond, escrow or letter of credit in favor of plan when appropriate.

Some of the options proposed by the PBGC are administrative changes. Some of the PBGC recommendations would require legislative action.

The working group has not reached a consensus on whether to support the PBGC recommendations. It believes that the issue of minimum funding waivers needs prompt resolution and acknowledges that doing so will require addressing a number of technical issues.

Recommendation: We recommend that a working group be formed including representatives from the Departments of Treasury, Labor, Commerce, the CEA, the IRS and the PBGC to develop a coordinated procedure for granting minimum funding waivers.

## 2. Recommendations from National Pension Forum

The National Pension Forum was organized by Secretary of Labor Raymond Donovan in early 1984 to review and analyze the effectiveness of the Department of Labor in carrying out its statutory responsibilities under Title I of the Employee Retirement Income Security Act (ERISA). The Forum was comprised of the ERISA Advisory Council, members of Congress and representatives from the Department of Treasury, the Office of Management and Budget, the Council of Economic Advisers and

- 3 -

the Pension Benefit Guaranty Corporation. The Secretary instructed the Forum to make administrative and legislative recommendations for improving the Department's ability to administer Title I. The Forum requests Cabinet Council consideration of the recommendations, summarized below, which apply to the organization and structure of the Department Labor.

The Forum's recommendations are predicted on the assumption that the pension program cannot expect any substantial increases in resources or staff. Budgetary increases could have been recommended as the remedy for many of the problems facing the pension program. Instead, the Forum members sought more realistic and long-range solutions by addressing the structure and organization of the offices which administer Title I. It is the belief of the National Pension Forum participants that, if implemented, the recommendations would greatly improve the department's ability to fulfill its statutory obligations under Title I of ERISA.

The recommendations are summarized below. The unabridged version is provided as Attachment A.

A. Information Handling. The Forum urges Cabinet Council and OMB approval for the computerization of the ERISA information management system.

The credibility of the Department's entire effort under Title I depends on its ability to use the information that is filed in annual reports. If the Department cannot dramatically improve existing information handling, it will continue to be impossible to use all of the information supplied by the public at considerable cost. The Department is currently conducting a pilot project to determine what benefits such a program would have, not only to the Labor Department, but also to the other agencies which administer ERISA.

B. Enforcement. The Forum recommends that the Secretary extend to the pension program Schedule A hiring authority which would permit the hiring of lawyers at the investigative level.

At the current time, the ERISA program does not have the authority to hire lawyers to investigate alleged abuses of the law before the cases are referred to the Solicitor's office for legal action. Too often this has resulted in investigations which have taken years to complete only to be referred back to the investigator by the Solicitor because the evidence was legally deficient. Schedule A hiring authority would permit the pension program to obtain the

- 4 -

expertise it needs to conduct efficient and timely investigations.

C. Rule-Making and Exemption-Granting. The Forum recommends that the Department of Labor study the concept of a self-regulatory organization (SRO) which might be involved in the prohibited transaction process.

As a first step, a notice was published in the Federal Register on December 10, 1984 (see Attachment B), soliciting comments on several aspects of the SRO concept.

D. Office of Pension Statistics. The Forum recommends that the Secretary create an Office of Pension Statistics to collect, analyze and report to Congress on data concerning employee benefit plans.

E. OPWBP Organization. The Forum urges the Secretary to take the following organizational steps:

- i. Rename OPWBP the Pension and Benefits Commission. This would distinguish the pension agency from other DOL agencies and would associate it with the professionalism of other commissions, such as the Securities and Exchange Commission.
- ii. Designate the principal officer as the Commissioner with the rank of Assistant Secretary and provide for the appointment by the Secretary of an Assistant Commissioner. The responsibilities of the executive office of the Commission require two political appointees: one to act as the chief executive officer and the other to have contact with Congressional committees, Executive branch agencies and private sector groups.
- iii. Designate the Commission as a separate entity for budgetary purposes.

F. Public Outreach and Assistance. The Forum urges the Secretary to devote resources to public outreach and assistance in an effort to protect beneficiaries, to foster an attitude of voluntary compliance and to assist the enforcement program.

G. Regulatory Requirements. The Forum makes the three following recommendations to ameliorate the problem of regulatory requirements:

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- i. The Forum urges the Secretary to allocate resources for and place priority on the expanded use of class exemption.
- ii. The Department is urged to re-evaluate information requirements; and
- iii. The Forum urges Executive Branch agencies to recognize the unique problems of small businesses in complying with reporting and disclosure requirements and, so far as permitted by law, to make special provisions to ameliorate the burden on small businesses.

### 3. Single Employer Pension Insurance

#### A. Financial Status of PBGC Single Employer Fund

The premium that is charged by the Pension Benefit Guaranty Corporation (PBGC) is set by law. The current premium (\$2.60/year/participant) is too low to cover the agency's commitments. The PBGC's deficit (negative net equity) has grown rapidly in the last five years and is now almost \$500 million. Some of the PBGC's financial problems are caused by loopholes in the law that have allowed solvent employers to dump their pension liabilities on the PBGC. About one-fifth of the drains on the PBGC have been due to terminations by solvent employers not undergoing bankruptcy or reorganization hearings.

#### B. Single Employer Legislation

During the last three years there have been legislative efforts to raise the premium and close the loopholes in the law but this legislation has died in Congress. All the major interest groups recognize the need for a premium increase but they are not anxious to see one. Consequently, there is little incentive to resolve disputes that arise over other provisions in a premium bill and coalitions have been fragile. The PBGC now estimates that a \$7.50 premium beginning in January 1985 is needed to retire the deficit over the next 15 years and restore the solvency of the fund. Delaying the premium increase only raises the required premium and increases pressures for a general revenue bailout.

The PBGC is now drafting legislation to increase the premium and make other changes in the single employer insurance program that will be part of the Omnibus Budget Reconciliation Act this spring. That legislation will not be enacted without strong support from the Administration.

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#### 4. Legislative Initiatives

Several bills to change regulations affecting the private pension system were submitted in the last Congress. They will be resubmitted again this session. Many have bi-partisan support. The sponsors believe that these changes will increase private pension benefits and reduce the pressure on the social security system.

The most important of these proposed changes cover the following:

- A. Vesting - Many plans now provide vesting after 10 years. There will be legislative initiatives this year to change minimum vesting regulations so that workers acquire vested pension rights earlier.
- B. Integration - Under current regulations, plans that qualify for tax advantages must offer the same pension benefits as a fraction of earnings to workers at all pay levels. Employers may include social security benefits in the calculation of replacement rates. As a result, some plans now offer little or no benefits to workers with low pay because they have relatively high replacement rates under social security. There will be bills introduced this year to change integration regulations in ways that would increase required private pension benefits for workers with low pay. It is difficult to estimate the cost of the proposals mentioned here but if adopted, integration proposals would probably impose the biggest costs on employers.
- C. Portability. Portability would reduce the loss in vested pensions rights that can occur with a change in jobs. Portability proposals include transfers of an individuals vested pension rights to a succeeding plan, required (rather than allowed) deposits to an IRA, or a central clearing house for vested pension benefits. Portability issues arise to a large extent because low levels of vested benefit can be offered as a lump sum to plan participants upon termination. Younger workers often use these lump sum disbursements for current consumption; they are not saved for retirement.
- D. Pension Accrual for Older Workers. In some plans, pension benefits are increased by less per year (or not at all) for work past the age of 65. This practice has been criticized as age discrimination

- 7 -

and was the subject of legislation introduced last year as well as a recent EEOC ruling. The EEOC ruling, which requires continued benefit accrual past the age of 65, is subject to agency review and public comment. There is increasing awareness that many older workers leave the labor force not because they are forced to, but because they are encouraged to by the incentives inherent in pension plans. Pensions have replaced mandatory retirement rules as age discrimination culprits.

While the intent of these proposals is to increase pension benefits they may also have unintended effects as well. If benefits are easily vested, portable, and accrued at any age, they become in essence, employer-provided IRA's -- tax sheltered savings, with little potential to retard turnover for young workers and encourage retirement for older workers. Employers may have little interest in pensions plans that provide only the tax advantages that can be secured through IRA's. No employer is required to offer a pension plan. Few may do so if pensions provide little opportunity to control turnover.

Integration will increase retirement resources of workers at the low end of the income distribution only if these workers do not reduce their saving to offset anticipated pension benefits. Because low income is usually associated with low savings, full adjustment is unlikely. In that case integration would force many low income workers to consume less when they are young because their pay will be reduced as a consequence of a mandated increase in pension benefits. Workers already at the minimum wage could become unemployed. When wage adjustments are taken into account, integration proposals become paternalistic judgements about the way individuals use their resources over their lifetimes. Some portability proposals fall in the same category.

- E. Coordination. One persistent issue has been the coordination of pension policy. Many people believe that there should be a single agency to make pension policy decisions and that there should be a "national pension policy" to formulate retirement objectives. A bill to establish a single agency was introduced in Congress last year and a national pension policy was a major topic at several gatherings of pension experts last year (the 10th anniversary of ERISA).

While it is true that the agencies that administer ERISA (Labor, Treasury, PBGC) all have different objectives, it is

- 8 -

not clear that the resulting conflicts can be reduced by the creation of a single agency. Nor is it clear that they should be. The tax advantages of pensions will always compete with other claims on the budget. This conflict cannot be resolved with a single agency.

A national pension policy, as it is commonly understood, raises serious questions. There are many ways to achieve retirement objectives and these objectives vary enormously from one individual to the next. In general, national pension policies would reduce the flexibility that individuals have to achieve their retirement objectives.

F. Reversion of Excess Assets. Legislation may be pursued in Congress to limit reversions of excess assets from terminated defined benefit pension plans that goes beyond the scope of the Administration's guidelines on excess asset reversions announced in May of 1984. The Administration's policy on excess assets is designed to encourage plan sponsors to create, maintain and adequately fund defined benefit pension plans. Broad legislative initiatives which attempt to restrict reversions of excess assets could tip the delicate balance between defined benefit and defined contribution plans and would discourage the creation, maintenance and funding of defined benefit pension plans.

G. MPPAA. The Multiemployer Pension Plan Amendment Act of 1980 established withdrawal liability rules for members of multiemployer plans. Employers can be assessed substantial liabilities when they sell their business or retire even though they have always made the pension contribution stipulated in their agreements with a union. In some cases these liabilities are greater than the net worth of the business. Withdrawal liability rules have also created strong disincentives for new employers to join multiemployer funds, increasing the funding problems of these plans. Despite these problems, there appears to be little hope for any legislative change in the withdrawal liability rules in the near future.

## 5. Administration Activities

A. Risk-related premium. The PBGC is preparing a draft report on the feasibility of a risk-related premium for the single-employer insurance program,



- 9 -

a study that was required by the 1980 MPPAA legislation. The current premium schedule is the same for all plans. Fully funded plans that pose no risk to the Corporation are charged the same premium as plans that have large unfunded liabilities. A risk-related premium would encourage better funding practices. A risk-related premium could also be based on a schedule that would automatically maintain the solvency of the single employer fund, avoiding the legislative struggles that are required to change premiums. Choosing a specific premium structure, however, will be a matter of some complexity and political sensitivity.

- B. Privatization. One attractive alternative to the current system is privatization of at least some of the functions of the PBGC. The PBGC Advisory Board has set up a task force to study privatization proposals.
- C. Asset Reversions. Terminations to recover excess assets slowed considerably after the Administration issued reversion guidelines last spring but they increased again in December when the Treasury tax plan was issued. The tax plan includes a 10 percent excise tax on all reversions. The Treasury has proposed the tax to establish tax neutrality with respect to a firm's investment decisions and to make the tax treatment of asset reversions similar to the tax treatment of IRA's. This tax may reduce the willingness of employers to establish and fund defined benefit pension plans.

## NATIONAL PENSION FORUM

### Recommendations for Action by Secretary Donovan

#### BACKGROUND

The National Pension Forum was organized by Secretary Donovan in early 1984 as one of the essential parts of his commitment to discharge as well as possible the obligations of the Department of Labor under Title I of ERISA. The Secretary instructed the Forum to propose administrative and legislative recommendations to improve the Department's ability to fulfill its statutory responsibilities under Title I, the most important of which is protecting the interests of participants and beneficiaries in private sector benefit plans. Other elements comprising the Secretary's commitment have included the separation of Pension and Welfare Benefit Plans (PWBP) personnel and operations from the Labor-Management Services Administration (LMSA). This process was effectively completed in August 1984.

The Forum is comprised of the statutory ERISA Advisory Council, members of both Houses of Congress and representatives from the Department of Treasury, the Office of Management and Budget, the Council of Economic Advisors, and

## FINDINGS

The public interest requires that the Department of Labor substantially improve its prior level of discharge of Title I of ERISA in the following areas:

1. Information Handling. The information contained in annual reports should be timely. Electronic information management is the only way to create an ERISA data base which will support effective enforcement of ERISA's substantive requirements, responsible discharge of the Department's research and policy obligations, and for public information purposes. The present situation is unacceptable.

2. Enforcement. A strong enforcement program is critical to the administration of ERISA. The current program is unacceptable and must be improved.

3. Rule-making and exemption-granting. The lead time necessary for granting exemptions is having an adverse effect on the American economy in preventing the increasingly large pools of capital subject to ERISA from being invested in areas where quasi-judicial action by OPWBP is necessary in order to authorize the transaction. The Forum appreciates the complexity of ERISA issues and applauds the quality of the

## RECOMMENDATIONS

### 1. Information Handling

The Forum urges the Secretary to request Cabinet Council and OMB approval for the computerization of the ERISA information management system and for the subcontracting of such a project to private firms if studies show the system would be more cost-effective when operated by an outside party. The credibility of the Department's entire effort under Title I depends on its ability to use the information that is filed in the annual reports. If the Department cannot dramatically improve existing information handling, it will continue to be impossible to use all of the information supplied by the public at considerable cost. This recommendation accordingly is given the highest priority by the Forum.

ERISA imposes detailed requirements on plan sponsors to file annual reports, to prepare plan descriptions and to file and distribute summary plan descriptions. The Forum heard substantial testimony which indicated that the information contained in these filings is not being effectively managed or utilized. The sheer volume of filings -- over 800,000 annual reports per year -- makes

the pension program at the investigative level. Litigation responsibility would remain in the Solicitor's Office, and existing collective bargaining agreements would be observed.

In considering the Department of Labor's performance with respect to ERISA, the Forum has been struck by the fact that ERISA is totally unlike any other law entrusted to the Department. Not only is the law itself highly technical and complex, but it directly impacts on numerous industries, including securities, insurance, investment banking, real estate, etc., which have traditionally not been within the sphere of responsibility of DOL. Additionally, in both the regulatory and enforcement areas, close coordination with other federal agencies, such as the Internal Revenue Service, the Department of Justice, Comptroller of the Currency, and Securities and Exchange Commission, distinguishes the administration of ERISA from that of other laws enforced by the Department.

In the enforcement area, ERISA investigations require detailed knowledge not only of the complex law itself, but also of the operation of the banking, real estate and securities industries and the investment instruments handled by those industries. In addition, banks, investment advisors, and brokerage firms are integrally

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expertise it needs to handle the complexity of ERISA. Such a move would recognize the fact that ERISA is more akin to the laws enforced by agencies such as the SEC (which has the necessary hiring authority) than to the other programs administered by the Department.

### 3. Rule-Making and Exemption-Granting

The Forum recommends that the Department of Labor explore the concept of a self-regulatory organization (SRO). As the first step in this research, a notice will be published in the Federal Register soliciting comments on the ways in which such an organization might be involved in the prohibited transaction exemption process.

ERISA confers massive responsibility on DOL with respect to regulation of the investment of funds by plan fiduciaries. The law defines very strictly "interested parties" and prohibits their involvement in certain investments. The amount of money subject to ERISA (50% of total NYSE underwritings in 1983, for example) and the dynamic growth of new financial instruments guarantees continuing pressure on DOL for timely issuances of rulings. OPWBP has made a conscious decision with respect to its sparse personnel resources to continue to

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. How timing, composition and planning for an SRO should be structured.

#### 4. Office of Pension Statistics

The Forum recommends that the Secretary create an Office of Pension Statistics within the Office which administers Title I so as to enable the Secretary, as the principal policymaker on retirement income within the Executive Branch, to understand and anticipate developments as they affect pension policy and to make appropriate reports, recommendations and policy initiatives to the Legislative and Executive branches.

Section 513(a) (2) of ERISA authorizes and directs the Secretary of Labor to collect and analyze data relating to employee benefit plans and to report the findings to Congress and to the President. To fulfill this responsibility, the Forum concludes that a central source of statistical information should be established within the Department. The Office of Pension Statistics would rely on the information contained in the electronic data base.

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C. Designate PBC as a separate entity for budgetary purposes.

6. Public Outreach and Assistance

The Forum urges the Secretary to devote resources for public outreach and assistance. The Forum believes that such a policy helps to protect beneficiaries, foster an attitude of voluntary compliance, and facilitate and make more effective the enforcement program.

In a limited way, OPWBP has devoted resources to public assistance as a kind of "preventive maintenance" in the belief that helping the public reduces the cost of enforcement. This practice has been challenged in the past. It is the belief of the Forum that ERISA enforcement is facilitated by efforts to reach out to the public in such ways as explaining the operation of the law, assisting in the preparation of returns, and being available to answer technical questions. If the appropriateness of allocating resources to an outreach effort under ERISA continues to be questioned, the Forum urges the Secretary to propose legislation specifically authorizing such an activity.



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- C. In evaluating the reporting and disclosure requirements, the Forum urges the Executive Branch agencies to recognize the unique problems of small business in complying with those requirements, and, so far as permitted by law, to make special provisions to ameliorate the burden on small business of such requirements.

## 2. National Retirement Income Policy

With the acknowledgment that national pension policy should not be construed to dictate individual pension decisions, certain Forum members recommend that Congress consider formulating an express National Retirement Income Policy; and that the policy be explicitly considered when making legislative and administrative decisions regarding the three components of retirement income: social security, employer retirement plans (ERISA) and savings.

The Forum heard testimony from several witnesses about the need for central policy leadership in the retirement income area and has determined that such a broad-based policy directive should come from the Congress.

## 3. Single Agency

Certain Forum participants endorse H.R. 3339, the bill introduced by Representatives John Erlenborn and William Clay, to consolidate the responsibility for carrying out the provisions of ERISA into a newly established single agency.

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Treasury, Justice, Commerce, and Health and Human Services, and a permanent secretariat to be provided by the Department of Labor. The Council would have had coordinating responsibilities with respect to information, inconsistencies and the development of short- and long-term policies as they affect the relationship among the agencies. The Order was not actively effective because it was signed in the last days of the Carter Administration and was repealed in 1982.

During the last four years, interagency coordination has been informal. Crises that have arisen have been handled by the Pension Policy Working Group of the Cabinet Council of Economic Affairs. A permanent Interagency Employee Benefits Council would have the ability to deal with issues before they become crises. It would also work in conjunction with any future single agency for ERISA administration to help achieve coordination with the many agencies which would not be included in the single agency.

The Administrator hereby certifies that this matter will have no significant impact upon small entities within the meaning and intent of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The establishment of annual aggregate production quotas for Schedules I and II controlled substances is mandated by law and by the international commitments of the United States. Such quotas impact predominantly upon major manufacturers of the affected controlled substances.

Therefore, under the authority vested in the Attorney General by section 306 of the Controlled Substances Act of 1970 (21 U.S.C. Code, section 826) and delegated to the Administrator of the Drug Enforcement Administration by § 0.100 of Title 28 of the Code of Federal Regulations, the Administrator hereby orders that the aggregate production quotas for 1984 for the following controlled substances, expressed in grams of anhydrous base, be established as follows:

Basic class	1984 aggregate production quotas
Schedule I	
Cocaine	5
Lysergic acid diethylamide	10
Mescaline	5
Heroin	5
Schedule II	
Benzoylgonine	50
1-oxo-5α-androstano-3β-carbonyl	15
Phencyclidine	50
1-phenylcyclohexanone	15

Dated: November 14, 1984.

Francis M. Mullen, Jr.,  
Administrator, Drug Enforcement  
Administration.

[FR Doc. 84-32083 Filed 12-7-84; 8:48 am]  
BILLING CODE 4470-09-01

## Immigration and Naturalization Service

### Registration of Mariel Cubans

AGENCY: Immigration and Naturalization  
Service, Justice.

ACTION: Notice of extension of  
registration period for Mariel Cubans.

SUMMARY: Reference is made to the registration notice concerning Mariel Cubans, which appeared in the Federal Register on November 23, 1984, at 49 FR 46212, requiring the registration of all persons born in Cuba or who are Cuban nationals who are not now citizens of the United States and who:

(a) Arrived in the United States between April 15, 1960 and October 10, 1980 (the "Mariel Boatlift"),

(b) Have been given the Immigration designation "Cuban/Haitian Entrant (Status Pending)," and

(c) Have not subsequently become lawfully admitted permanent residents of the United States.

Notice is hereby given that the registration period which was to be conducted December 3, 1984 to December 31, 1984 is extended through January 31, 1985. The period of registration is being extended to maximize the participation and overall effectiveness of the registration program.

DATE: Date of Registration: December 3, 1984 to January 31, 1985.

FOR FURTHER INFORMATION CONTACT:  
Joseph D. Cuddihy or F. Gerard  
Heinsauer, Immigration Examiners,  
Immigration and Naturalization Service,  
425 I Street, NW., Washington, D.C.  
20536, Telephone: (202) 633-3320.

(Sec. 265, Immigration and Nationality Act (8 U.S.C. 1305))

Dated: December 4, 1984.

Andrew J. Carmichael, Jr.,  
Associate Commissioner, Examinations  
Immigration and Naturalization Service.

[FR Doc. 84-32083 Filed 12-7-84; 8:48 am]  
BILLING CODE 4470-10-01

## DEPARTMENT OF LABOR

### Office of Pension and Welfare Benefit Programs

#### Participation of Self-Regulatory Organizations in the Prohibited Transaction Exemption Process— Solicitation of Comments

AGENCY: Office of Pension and Welfare  
Benefit Programs, Labor.

ACTION: Solicitation of comments.

SUMMARY: This document requests comments from interested members of the public on the feasibility of participation by self-regulatory organizations in developing exemptions from the prohibited transaction rules of ERISA. The existing prohibited transaction exemption process has been criticized, and the Department anticipates that the public comments received in response to this notice will assist it in studying more efficient ways of handling prohibited transaction exemption requests.

DATE: Comments should be submitted on or before February 8, 1985.

ADDRESS: Comments (preferably 3 copies) should be submitted to the Office of the Administrator, Office of Pension and Welfare Benefit Programs, Room S4516, U.S. Department of Labor.

Washington, D.C. 20210, Attention:

"SRO Inquiry," (202) 633-3320  
FOR FURTHER INFORMATION CONTACT:  
Janet Brown (202) 523-8952.

SUPPLEMENTARY INFORMATION: The Department of Labor (the Department) is responsible for administering the fiduciary responsibility provisions of the Employee Retirement Income Security Act of 1974 (ERISA). Section 406 of ERISA prohibits certain transactions between a plan and a "party in interest" and section 4975 of the Internal Revenue Code (the Code) imposes an excise tax with respect to prohibited transactions between a plan and a "disqualified person" (defined, with certain minor exceptions, in the same manner as the term "party in interest").

Section 408(a) of ERISA and Section 4975(c)(2) of the Code provide that the Secretary of Labor and the Secretary of the Treasury, respectively, may grant administrative exemptions from the prohibited transaction provisions of ERISA, provided certain conditions are met. The Secretary of the Treasury's authority to issue such exemptions was transferred to the Secretary of Labor in 1978; since that time prohibited transaction exemptions have been issued solely by the Department of Labor.<sup>2</sup>

The Department is exploring methods of enhancing the prohibited transaction exemption process, particularly as it relates to complex financial transactions. One method under consideration is whether the private sector might be more involved in the exemption process. Thus, the Department is soliciting comments from interested persons with respect to this concept.

### Background

#### A. Statutory Provisions

Under Section 408(a) of ERISA,<sup>3</sup> the Department may (with certain limited exceptions) grant conditional or unconditional exemptions from all or part of the prohibited transaction restrictions of the Act. Before granting such an exemption, however, the Department must find that the exemption is: (1) Administratively feasible, (2) in the interests of the plan and of its participants and beneficiaries.

<sup>1</sup> 29 U.S.C. 1001, et seq.

<sup>2</sup> Reorganization Plan Number 4 of 1978 (43 FR 47713, October 17, 1978), effective December 31, 1978 (44 FR 1085, January 3, 1979).

<sup>3</sup> Except where the context clearly requires otherwise references in this notice to the various provisions of Title I of ERISA should also be read to refer to the corresponding provisions of the Code.

the protection of the rights of participants and beneficiaries.

Section 408(a) also establishes certain procedural requirements for administrative exemptions from the prohibited transaction rules. The Act requires that the Department establish an exemption procedure and that exemptions may only be granted pursuant to that procedure. In addition, the Department must publish notice of a proposed exemption in the Federal Register and must assure that adequate notice of the pendency of the exemption is given to interested persons. The Department must also interested persons to present views. In the case of an exemption from the restrictions of fiduciary self-dealing in Section 406(b) of ERISA, the Department may not grant the exemption unless it affords an opportunity for a hearing and makes a determination on the record with respect to the three findings required by the Act.

#### B. The Exemption Process

The Department administers the prohibited transaction exemption program pursuant to the ERISA Exemption Procedure<sup>4</sup> (ERISA Procedure 75-1). Under the procedure, any party in interest (or disqualified person) with respect to a plan who is or may be a party to a prohibited transaction may initiate an exemption proceeding by filing an exemption application with the Department. In addition, any party in interest or any association or organization representing parties in interest may initiate a class exemption proceeding by filing an exemption application. The Department may also propose exemptions on its own motion.

An exemption application must include detailed information regarding the plans involved, applicant or applicants, and the transactions for which relief is requested. This information includes a detailed description of the fiduciaries and parties in interest who would be involved in the transactions, a statement whether the transactions are customary in the industry involved and a description of the hardship or economic loss which would result if the exemption application is denied. Further, the application must contain a statement explaining why the exemption would be consistent with three statutory findings that the Department must make in order to grant it.

An exemption application must also disclose information regarding the previous activities of the applicant and

the plan or plans involved. For example, the applicant must indicate whether it has ever been found to have engaged in a prohibited transaction or whether it or any other party in interest who would be involved in the transaction is, or in the last five years has been, a defendant in any lawsuit concerning such person's conduct as a fiduciary or party in interest.

Upon receipt, an application for an individual exemption is given an identification number and is assigned to an employee benefits specialist in the Division of Exemptions of the Office of Pension and Welfare Benefit Programs. The analyst reviews the application and, if necessary, requests additional information from the applicant.

After the exemption application and any additional material submitted by the applicant are reviewed, a decision generally is made either to propose the exemption or to issue a tentative denial letter.<sup>5</sup> A tentative denial letter states that the Department has tentatively decided not to propose the exemption and contains a brief statement of the Department's reasons for the determination.

The ERISA exemption procedure also provides that an applicant may request a conference as of right in the event the Department contemplates denying the exemption request. Thus, a tentative denial letter will also contain an offer to hold such a conference. Exemption conferences are held between the applicant (or the applicant's representative) and employees of the Department and consist of an informal exchange of views regarding the issues raised by the exemption application.

If, after consideration of any material submitted by the applicant in response to the tentative denial letter (and any material submitted, or arguments advanced at the conference), the Department determines that the application for exemption should still be denied, it will issue a final denial letter informing the applicant of its action and providing a brief statement of reasons.

If the Department tentatively decides that an exemption application should be granted, it will publish a notice of pendency of the exemption (notice of proposed exemption) in the Federal

Register. This notice contains a summary of the representations made by the applicant in the exemption application and a statement of the exemptive relief which the Department proposes to grant. In addition, the proposed exemption requests comments from interested persons within a stated period of time (usually 40 days). In the case of a proposed exemption that would provide relief from any of the restrictions on fiduciary conduct in Section 406(b) of ERISA, the proposed exemption also indicates that any interested person may request a hearing with respect to the proposed exemption.

The applicant for a proposed exemption must also assure the Department that notice of the pendency of the exemption is given to interested persons. The nature and extent of such notice varies depending upon the nature of the proposed exemption and the plan or plans involved.

After the proposed exemption has been published and the comment period has expired, the Department will consider any comments submitted; in the case of a Section 406(b) exemption, it will conduct a hearing if one is requested. On the basis of the record thus developed (including the application, any additional submissions of the applicant, any written comments from interested persons, and the testimony at any hearing on the exemption), the Department will make a final decision with respect to the proposed exemption. If the proposed exemption is granted, a notice to that effect is published in the Federal Register. If the Department determines not to grant the proposed exemption, it publishes a notice withdrawing the proposal and issues a final denial letter to the applicant.

The Department's actual experience has been that it receives no comments on the vast majority of proposed exemptions and that most proposed exemptions are granted as a matter of course after expiration of the comment period. The Department retains the authority, however, to independently decide to deny an exemption that has been proposed.

Applications for class exemptions are treated in a manner similar to applications for individual exemptions, but with some modifications. First, trade groups representing classes of persons who encounter similar prohibited transaction issues are typically actively involved in the class exemption process. Second, since class exemptions by their nature relate to a variety of transactions the specific characteristics of which have not been reviewed by the

<sup>4</sup> If review of the exemption application indicates that the transaction is either not a prohibited transaction under ERISA or is an exempt transaction under an existing statutory or administrative exemption, the Department will issue an "interpretive response" calling attention to the relevant authorities and indicating that, if the Department receives no further submission from the applicant within 30 days (explaining why further relief is necessary), the application file will be closed without further action.

<sup>5</sup> 40 FR 32473, April 28, 1975.

Department, they typically contain detailed conditions that are intended to assure that the exemption will be consistent with the statutory standards. Third, since class exemptions affect a large number of parties in interest, many of whom have a substantial interest in the exemption proceeding but who have not been parties to the application, comments received in response to a notice of proposed exemption often play an important role in the process of developing a final exemption. In this respect, the Department has frequently conducted informal hearings regarding proposed class exemptions in order to assure that the views of all affected persons are taken into account.

#### Possible Involvement of Private Sector Organizations in the Exemption Process

##### A. Involvement of Private Sector Groups Under the Existing Procedures

The legislative history of ERISA indicates that Congress intended that the Department administer the prohibited transaction exemption program so as not to disrupt unnecessarily the established business practices of financial institutions that provide fiduciary services to employee benefit plans.<sup>6</sup> Accordingly, private sector involvement in the prohibited transaction exemption process is both appropriate and necessary in order to carry out Congressional intent. Industry groups now play a relatively significant role in the development of class exemptions from the prohibited transaction rules, but have little, if any, role in the individual exemption process.

Industry group submissions have often served as a valuable resource in identifying areas where relief from the prohibited transaction rules is needed. The utility of trade group submissions to the Department is limited, however, in two main ways. First, such submissions often focus on the affected industry's need for relief from the prohibited transaction rules rather than an analysis of the ways in which the Department can fashion exemptive relief that is consistent with the statutory factors that must be satisfied before an exemption may be granted. Second, industry submissions often involve sophisticated financial transactions, but do not present the factual material in the way that is most useful to the Department's staff in making a decision.<sup>7</sup>

In the Department's view, more effective use of private sector resources in dealing with prohibited transaction exemption applications—those seeking individual relief as well as those seeking class relief—could expedite the exemption process and could result in exemptions that will relieve unnecessary burdens on parties in interest and will be consistent with the Department's statutory obligations. Thus, the Department is exploring ways in which this increased private sector involvement can be achieved, one of which might be the participation of a self-regulatory organization.

##### B. Self-Regulatory Models in the Securities Industry.

One area in which self-regulatory organizations play a very significant role is in the administration of the federal securities laws. The Securities and Exchange Commission (the Commission) is the agency charged by Congress with administering those laws. In discharging its duties, however, the Commission makes use of a variety of private sector self-regulatory organizations (SRO's). These organizations perform some rulemaking, investigatory and enforcement functions for, and under the direction of, the Commission. The functions of these organizations are not completely analogous to the functions that a self-regulatory organization might perform under ERISA, but the Department believes their existence illustrates how private entities may play an important role in a federal regulatory program.

1. *Securities Industry Regulation.* Section 15A of the Securities Exchange Act of 1934 provides for the creation and registration of SRO's to establish and promote ethical and standardized principles of trade in the securities business.<sup>8</sup> Registration by SRO's with the Commission is permitted only if the Commission determines that such an association is organized so as to be able to comply with the Commission's rules and regulations as well as to enforce compliance among its members. Procedurally, the rules of an association must ensure that directors are representative of the differing interests in the financial community; substantively, an association's rules must be designed to "prevent fraudulent and manipulative practices, to promote just and equitable principles of trade

... [to facilitate] transactions in securities ... and in general, to protect investors and the public interest."<sup>9</sup>

Section 19 of the 1934 Act outlines the Commission's oversight responsibilities and powers regarding self-regulatory organizations. Registration of an exchange or SRO is subject to public notice and comment procedures and the substantive statutory requirements outlined in Section 15A. The Commission may grant or deny applications for registration; it also may cancel registration of an SRO if it finds that it has ceased to perform in the manner for which it was granted registration.<sup>10</sup>

Rules and regulations proposed by an SRO must be submitted to the Commission for review, with an opportunity for public notice and comment.<sup>11</sup> The Commission retains the authority to amend all rules of an SRO and it may even "summarily abrogate" them if it finds such action necessary in the public interest.<sup>12</sup>

The National Association of Securities Dealers, Inc. (NASD) is the one organization registered with the Commission under Section 15A of the 1934 Act. NASD is principally charged with promulgating, maintaining and enforcing a code of business ethics among over-the-counter brokers and dealers.<sup>13</sup> While membership in NASD is voluntary, almost all brokers and dealers are members and thus subject to its investigatory and disciplinary powers.<sup>14</sup> Members are generally forbidden from conducting business with non-members which both encourages membership and facilitates peer review.

NASD's membership is divided into 13 districts whose members elect some of the members of NASD's Board of Directors; other seats in the Board are reserved for representatives of industry and the professions. As of 1983, there were 298,000 registered representatives of the investment and securities industry, and 4835 member firms. Membership may be denied to or withdrawn from anyone suspended from a registered exchange or anyone convicted of a misdemeanor or felony involving such offenses as embezzlement, misuse of funds, or abuse of a fiduciary relationship among others.

<sup>6</sup> H.R. Rep. No. 1200, 93d Cong., 2d Sess. (1974).

<sup>7</sup> For example, an industry association's submissions often contain very general statements of fact, but do not discuss differences between its various members' business practices. In addition, the submissions often include voluminous

background material, but do not include a sufficient summary of the contents of the background material or a meaningful explanation of its significance.

<sup>8</sup> Securities Exchange Act of 1934, as amended, Section 15A; 52 Stat. 1070 (1938); 15 U.S.C. Section 78b-3 (1982), hereafter "1934 Act."

<sup>9</sup> 1934 Act, Section 15A(b)(2), (4), (6).

<sup>10</sup> 1934 Act, Section 19 (a) (1).

<sup>11</sup> 1934 Act, Section 19 (b) (1).

<sup>12</sup> 1934 Act, Section 19 (b) (3) (c).

<sup>13</sup> SEC, "The Work of the SEC," 13 (February 1984).

<sup>14</sup> NASD, "An Introduction to NASD," 15 (1984).

divisions: Legal and Compliance; Member and Market Services, and Automation. Within each division are various departments charged with developing and administering regulations and services for different segments of the securities industry. The Legal and Compliance Division has promulgated a Uniform Practice Code as well as rules of Fair Practice, both of which are submitted for approval to the SEC and which are the standards against which securities transactions conduct is generally judged. occasionally, NASD has adopted rules in lieu of regulation proposed or threatened by the SEC, such as its rules regarding "free riding" and "withholding".<sup>18</sup>

NASD staff at the district level conducts annual examinations of members' books and records; it is from this review that complaints against members typically arise.<sup>19</sup> These audits, conducted on an unannounced basis, examine members' books to check compliance with association rules. At the same time, NASD staff monitors compliance with the SEC's Net Capital Rule and the Federal Reserve Board's Regulation T.<sup>20</sup>

Member firms or individual violators of NASD standards are subject to sanctions imposed by NASD which range from censure, to fines, to expulsion. NASD has internal review procedures in place under which members may challenge a disciplinary decision; appeal is also available to the Commission and ultimately, to the courts. Only very rarely, however, has this external appellate procedure been invoked. Notice of expulsion of a member is released to the press, although lesser penalties may be kept confidential by the SEC.

NASD provides a range of services to its members. In addition to maintaining an over-the-counter quotation service, NASD has an Information Department which publishes newsletters, press releases and various educational booklets. These publications complement enforcement activities and serve as a form of preventive regulation. In addition, the Association conducts seminars and conferences to inform members of current issues as well as to solicit member views on matters affecting them.<sup>21</sup>

<sup>18</sup> See generally, Mark White, *The National Association of Securities Dealers, Inc.*, 28 Geo. Wash. L. Rev. 250, 280 (1959).

<sup>19</sup> The public as well as other NASD members may also initiate a complaint.

<sup>20</sup> See SEC Net Capital Rule at 17 CFR 240.15c-3-1; Federal Reserve Board Regulation T at 12 CFR 220.1-220.8.

<sup>21</sup> *Id.* at 12.

NASD's activities and reputation have allowed the Federal government to limit its involvement and expenditures in monitoring the activities of the securities industry. However, the fact that the Commission may increase its involvement in the regulation of the securities industry at any time, undoubtedly strengthens the industry's commitment to meaningful self-regulation.

**2. Financial Accounting Standards.** Another private sector organization upon which the Commission relies to aid it in discharging its statutory responsibilities is the Financial Accounting Standards Board (FASB). The legislation creating the Commission gave it the authority to develop and promulgate accounting standards to assure proper compliance with the financial disclosure provisions of that Act.<sup>22</sup> The Commission also has authority to prescribe accounting standards and procedures for compliance with the other three major acts which it administers.<sup>23</sup>

Historically, however, the Commission felt that reliance on accounting principles established by practitioners in the private sector was preferable to promulgating standards of its own. Thus, the Commission has chosen to maintain an oversight role toward the accounting profession. The Commission's first chief accountant stated as early as 1937 that the policy of the Commission was "to encourage . . . accountants to develop uniformity of procedure themselves . . . and to step in directly only as a last resort."<sup>24</sup>

More recently, the Commission reaffirmed its commitment to rely generally on private sector initiative in formulating financial accounting standards. A group established by the American Institute of Certified Public Accountants (AICPA) and chaired by former SEC Commissioner Francis M. Wheat conducted a study of the accounting standards area and recommended that a private sector organization would be most capable of setting standards for the accounting profession. As a result of this recommendation, the Financial Accounting Standards Board was

established in 1973. In its Accounting Series Release 150, the Commission announced that it intended to look at accounting principles established by FASB in administering the federal securities laws. Recognizing that private sector resources and expertise exceeded its own, the SEC stated that it endorsed the establishment of the Board because it provided "an institutional framework which will permit prompt and responsible actions flowing from research and consideration of varying viewpoints."

FASB's standard-setting process is conducted under formal rules of procedure similar to the Commission's own, which invite and consider broad-based public comment.<sup>25</sup> With regard to research and policy development, FASB also makes public its proposals and solicits suggestions and criticisms. Ultimately, it is the Commission's responsibility to ensure that adequate disclosure is made in the financial statements filed under federal securities laws. In order to fulfill this responsibility, the Commission maintains an active and ongoing oversight role of FASB. As with the NASD, the Commission has reserved the authority to establish its own rules of accounting if private sector initiative is not satisfactory. Thus far, however, the Commission has not seen the need to do so.<sup>26</sup> Of eighty standards promulgated by FASB since its inception, the Commission has expressed formal disagreement only once. The Commission and FASB maintain a close working relationship to alert each other to perceived issues and potential problems in the industry. Their relationship has been described as one of "mutual non-surprise."<sup>27</sup>

FASB performs no major enforcement activities. Rather, compliance is compelled by the Commission as part of its general enforcement program. Where an accountant has seriously departed from professional principles, the Commission may institute disciplinary proceedings under its Rule of Practice 2(e).<sup>28</sup> Accountants may be barred from further practice before the Commission or may be permitted to practice only under certain conditions.

The Board has seven members who are elected by its sponsoring organization, the Financial Accounting

<sup>22</sup> SEA of 1934 section 12(b), 15 U.S.C. section 781(b).

<sup>23</sup> The Securities Act of 1933, section 7, 15 U.S.C. 77a and Schedule A; The Public Utility Holding Act of 1940, section 5(b), 15 U.S.C. 79b, 79d and 79e; The Investment Company Act of 1940, section 8b, 15 U.S.C. 80a-8(b).

<sup>24</sup> Carman G. Blough, Comments in a Round Table on "Developments in Accounting Theory and Practice Since 1929," *American Institute of Accountants, 50th Anniversary Celebration* at 190 (1937).

<sup>25</sup> FASB, "Facts About FASB," Relationships with the Federal Government," at 1-4 (1984).

<sup>26</sup> See generally, SEC Report to Congress, "The Accounting Profession and the Commission's Oversight Role," (July 1, 1978).

<sup>27</sup> FASB, "Facts About FASB: 1 (1984).

<sup>28</sup> SEC Rules of Practice are codified at 17 CFR 201.1 et seq.

Foundation (FAF), for five-year terms. The Board employs a professional staff of approximately 45 people, most of whom are accountants. It also sponsors an advisory committee whose members are recognized experts in the field. The FAF receives contributions from the financial and accounting communities to support FASB, but recently, half of FASB's operating expenses have been met by the sale of publications.<sup>20</sup>

The Commission's reliance on FASB as a standard-setting organization has been subject to some criticism,<sup>21</sup> but a United States District Court upheld the Commission's reliance on FASB when it was challenged as an impermissible delegation.<sup>22</sup>

The use of self-regulatory organizations by the Commission implements a conscious Congressional policy. In passing Sections 15A and 19 of the 1954 Act, Congress decided that it was preferable for industry to have the opportunity to regulate itself rather than to have direct substantive intervention by the Commission. Congress thereby avoided what would have been large increases in the size of the Commission's staff and the attendant increases in public expenditures. At the same time Congress provided for, and the Commission has retained, authority for direct and swift federal intervention if the need arises.<sup>23</sup>

### C. Issues Pertaining to the Possible Role of an SRO in the ERISA Exemption Process

In its examination of alternative ways to handle exemption requests, the Department maintains as its primary goal the protection of the interests of participants and beneficiaries who are covered by plans subject to ERISA. Thus, any proposal to enhance the role of private organizations in the prohibited transaction exemption process must assure the Department's ability to diligently fulfill this obligation.

1. *Limitations on the Use of Self-Regulatory Organizations.* ERISA allows the Department to propose and grant exemptions from the prohibited transaction provisions of the Act only after it makes certain substantive findings and adheres to certain stated procedures. In the Department's view, any procedure under which a self-regulatory organization participates in the exemption process must preserve the

Department's authority to make an independent determination both with respect to the decision to propose an exemption and with respect to its decision to grant an exemption that has been proposed. In addition, any such procedure must assure that notice of pendency of the exemption be published in the Federal Register, that adequate notice be given to interested persons, and that an opportunity for a hearing be provided in appropriate cases.

2. *Fundamental Characteristics of Self-Regulatory Organizations.* In the Department's view, a self-regulatory organization must have certain fundamental characteristics in order to play a meaningful role in the prohibited transaction exemption process:

(i) *Independence.* The existing self-regulatory bodies discussed above have a high degree of independence. In the case of the NASD, specific provisions of the federal securities laws assure this institutional independence; in the case of FASB, the organizing professional and business groups have taken steps to assure institutional as well as financial independence. As to the latter, the Financial Accounting Foundation, a not-for-profit entity, receives contributions from the accounting community to fund FASB, but the Foundation stands between that community and the Board. The Department expects that any self-regulatory organization that might be formed to participate in the ERISA exemptions process would be similarly independent.

(ii) *Expertise.* A self-regulatory organization must possess a high degree of expertise in order to function effectively. Thus, the sponsors of such an organization must be prepared to provide resources adequate for the organization to develop a staff that has sufficient technical expertise for the organization to discharge its responsibilities. The Department believes that such expertise could be extremely valuable to its own exemptions staff in analyzing complex financial matters, and could thereby benefit all parties concerned.

(iii) *Continuity.* A self-regulatory organization should be a permanent body that performs services for its members in addition to having input in the exemptions process.

(iv) *Funding.* The Department anticipates that the treatment of expenses associated with membership in an SRO or the processing of exemption applications by such an organization would be assumed by its membership. In this respect, the costs of funding an SRO would not be dissimilar to the costs associated with applying for

a prohibited transaction exemption under the Department's existing procedures.

3. *Potential Functions of an ERISA Self-Regulatory Organization.* There appear to be at least three broad roles that a self-regulatory organization might perform under ERISA.

First, a self-regulatory organization could provide a source of expertise in the exemption process. Although access to such expertise would be helpful with respect to a variety of different kinds of exemption applications, it would be particularly useful in the case of sophisticated financial transactions involving large institutions. The staff of a self-regulatory organization could analyze specific exemption proposals and make recommendations based on their evaluation in the context of the specific statutory factors for granting an exemption. Their analyses and recommendations could be made available to the Department or to an advisory body. The self-regulatory organization and the Department could also cooperate in developing guidelines which would assure that the analyses and evaluations submitted by the self-regulatory organization are of maximum use, in form and content, to assist the Department in making a prompt determination. If the structure of the self-regulatory organization were such that the Department could be assured that the evaluations and analyses were disinterested and of consistently high quality, the Department could find it in the best interest of all parties to process the exemptions on an expedited basis. Ultimately, the goal of this process would be that the Department could make a decision on such exemption applications within a stated period of time.

A second function that an SRO might perform is to serve as an informed source of expertise for aiding the Department in developing class exemptions from the prohibited transaction provisions of ERISA. The concept of an agency negotiating with representatives of constituent groups for the purpose of developing regulations has been tested by other federal agencies and has met with some success.<sup>24</sup> The procedure of "regulatory negotiation," in the words of the Administrative Conference recommendation:<sup>25</sup>

<sup>20</sup> See FAA and EPA notices of intent to establish regulatory negotiation advisory committees at 48 FR 21339 (1983), 48 FR 7494 (1983), and 49 FR 17376 (1984). See also favorable review of FAA negotiations at 31 Fed. Bar News and Journal 371 (Nov. 1984).

<sup>21</sup> A.C.U.S. Rec. 82-4, 1 CFR 305.82-4 (1984).

<sup>22</sup> FASB's operating expenses for calendar year 1983 were \$8,445,000.

<sup>23</sup> *The Accounting Establishment, A Staff Study*, S. Doc. 65-34, 85th Cong., 1st Sess. (1977).

<sup>24</sup> *Arthur Anderson & Co. v. S.E.C.*, No. 75-C-2532, unpublished op. (N.D. Ill. Sept. 2, 1976).

<sup>25</sup> See S. Rep. No. 1458 at 3-4 and H.R. Rep. No. 2307 at 4-4, 7th Cong., 3d Sess. (1828).



enable the interested parties to identify the major issues, gauge their importance to the respective parties, identify the information and data necessary to resolve the issues, and develop a rule that is acceptable to the respective interests, all within the contours of the substantive statute.

The Department believes that private organizations may be able to perform an important role in developing class exemptions through the use of a "negotiation" technique similar to that described above. Participation by an SRO in such a process would appear to have particular potential because the SRO would, over time, develop a high degree of expertise in dealing with issues arising under the prohibited transactions of ERISA.

A third possible role for a self-regulatory organization might arise if such an organization possessed a very high degree of independence from its supporting membership, if its membership adhered to high standards of conduct developed by the organization and if the self-regulatory organization could compel adherence to those standards by imposing meaningful disciplinary actions. In such circumstances, the Department might be able to fashion a class exemption under which relief would be conditioned (in whole or part) on membership in the self-regulatory organization. A self-regulatory organization would need to be very well-established in order to play such a role, however, and the Department and the public would need to have a high degree of confidence in the organization in order to make the findings required for such an exemption. Accordingly, the Department believes that it is premature to consider whether a self-regulatory organization could ultimately perform this function.

#### Solicitation of Comments

The Department is conducting an intensive study of the feasibility of making use of self-regulatory organizations in the administrative exemption process and believes that comments from interested members of the public will be of significant assistance in conducting this study. Although the Department invites, and will consider, comments on all aspects of the SRO concept, it specifically invites comments on the following:

1. Whether any existing private groups have the essential characteristics of independence, expertise and continuity to serve as a self-regulatory organization in the context of the ERISA exemption process. Comments

addressing this issue should identify the group or groups that might serve a self-regulatory function and describe their structure and operations.

2. Whether there is any interest on the part of one or more groups of fiduciaries or other parties in interest in establishing and supporting self-regulatory organizations. Comments addressing this issue should identify the group or groups involved and describe the purposes of any proposed organization.

3. Whether there are any practical impediments to the use of self-regulatory organizations in the ERISA exemption process. In this respect, the Department is particularly interested in comments addressing the potential consequences of application of the Federal Advisory Committee Act (FACA) to the activities of a self-regulatory organization.<sup>22</sup> FACA applies to any group that is established or utilized by a Federal government agency "in the interest of obtaining advice or recommendations." Among other things, FACA requires that the advisory committee operate under a written charter, that it hold open meetings and that it perform solely advisory functions.

4. Whether some form of "negotiated" procedure could be used by the Department in developing prohibited transaction class exemptions.

5. Whether there are other functions that a self-regulatory organization might perform. For instance, could an SRO compel adherence to high standards of conduct developed by the organization through the imposition of meaningful disciplinary actions?

Three copies of each respondent's comments should be mailed or delivered to the Administrator of the Office of Pension and Welfare Benefit Programs at Room S4516, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, D.C. 20210, and should be marked "Attention: SRO Inquiry." Comments should be received on or before [insert date 60 days from date of publication in the Federal Register].

All comments received by the Department will be available for public inspection and copying in the Public Disclosure Room of the Office of Pension and Welfare Benefit Programs, Room N4677, 200 Constitution Avenue, NW, Washington, D.C.

<sup>22</sup> 5 U.S.C. App. II. The General Services Administration has issued interim regulations under the Federal Advisory Committee Act, 41 CFR 101-11.6101, et. seq.

Signed at Washington, D.C., this 4th day of December 1984.

Robert A.G. Monks,

Administrator, Office of Pension and Welfare Benefit Programs, United States Department of Labor.

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## NATIONAL COMMISSION ON AGRICULTURAL TRADE AND EXPORT POLICY

### Administrative Committee; Notice of Meeting

The Administrative Committee of the National Commission on Agricultural Trade and Export Policy will meet in Washington, D.C. on December 19, 1984. The meeting will be held in Room 1300, Longworth House Office Building, Independence Avenue, Washington, D.C., at 9:00 a.m.

Matters before the Administrative Committee will include the selection of a staff director and the development of the Commission's future agenda. The Commission invites individuals interested in applying for the position of Staff Director of the Commission to make known their intent by sending information relating to their past experience and qualifications to: Dr. Kenneth L. Bader, Chairman, Commission on Agricultural Trade and Export Policy, 777 Craig Road, Post Office Box 27300, St. Louis, Missouri 63141. The deadline for receiving such applications is December 18.

Applicants for the position of staff director will be judged according to the following criteria:

- (1) Familiarity with the resources of Government;
- (2) Familiarity with trade issues;
- (3) Evidence of administrative ability;
- (4) Evidence of leadership skills.

The staff director of the Commission will act as the principal coordinator of all staff activities in support of the Commission under the direction of the Commission Chairman.

The National Commission on Agricultural Trade and Export Policy is an independent Commission established pursuant to Pub. L. 98-412.

Kenneth L. Bader,  
Chairman.

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